Supreme Court, U.S.
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No. 94-1734

In The
Supreme Court of the United States
October Term, 1994

LANSING DAIRY, INC., *et al.*,
Petitioners
v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 15, 1995

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) requires substantial judicial deference to an agency's reversal of its longstanding interpretation of a statute that it administers, where the agency has neither acknowledged that it changed its mind nor provided a reasoned explanation for the change.

2. Whether a court, in applying *Chevron*, is required to draw reasonable inferences from the statutory text to determine the intent of Congress.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

FARMERS UNION MILK MARKETING COOPERATIVE; GERALD PICHE; PETER J. KLEIMAN; EDWARD O. KLEIMAN; ART J. COREY, JR.; RAYMOND J. MARSICEK; RALPH BROCK; ED E. HANCHEK; ROBERT S. HANCHEK; RAYMOND S. HUBER; BENJAMIN C. HUBER; GEORGE A. HUBER, on behalf of themselves and all members of Farmers Union Milk Marketing Cooperative pooled under Federal Order 40 are respondents in support of petition and were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

MANITOWOC MILK PRODUCERS ASSOCIATION is also a respondent in support of petition. It intervened as a plaintiff in the district court and was an appellant/cross-appellee in the court of appeals.

LANSING DAIRY, INC., LIBERTY DAIRY COMPANY, FRIGO CHEESE CORPORATION are the petitioners in this case. They were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

DON GLICKMAN, Secretary of Agriculture, United States Department of Agriculture, is, pursuant to Rule 35.3 of the Rules of this Court, the successor to MIKE ESPY who was the appellee and cross appellant in the Court of Appeals. EDWARD MADIGAN was his predecessor and the named party at time of judgment in the district court. His predecessor, CLAYTON YUETTER, was the named defendant in the district court.

PRODUCERS EQUALIZATION COMMITTEE, (P.E.C.) is a respondent in this case. At the time of initiation of the case the P.E.C. was comprised of Michigan Milk Producers Association, a Michigan agricultural corporation, Independent Corporation Milk Producers Association, a Michigan agriculture association, Southern Milk Sales, Inc., a Texas agriculture association, and National Farmers Organization, an Iowa non profit corporation. It intervened as a defendant in the district court and was an appellee and cross-appellant in the court of appeals.

Farmers Union Milk Marketing Cooperative and Manitowoc Milk Producers Associations are both agricultural cooperatives owned by their producer members. There are no public corporations of which they are either subsidiary or parent.

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Brief of Respondents
in Support of
Petition for a Writ of Certiorari

OPINIONS BELOW

The court of appeals opinion (Pet. App. 1a-40a) is reported at *Lansing Dairy, Inc. v. Espy*, 39 F. 3d 1339 (6th Cir. 1994).

The opinion by the district court is not reported but appears at 1992 WL 71372 and is found at Pet. App. 41a-60a.

JURISDICTION

On January 23, 1995 the court of appeals denied an application for rehearing of that court's October 31, 1994 decision. Pet. App. 266a-267a. Petitioners filed a petition for certiorari on April 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

7 U.S.C. §608c(5), 7 U.S.C. §608c(18) and 7 C.F.R. Part 1040 are reproduced, in relevant part, at Pet. App. 268a-278a.

STATEMENT

1. Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§601 *et seq.* (Act), the Secretary of Agriculture formulates and administers federal milk marketing regulations in various regions throughout the United States to regulate the "minimum prices" of milk to be paid to producers. Each of these regions is referred to as a "marketing area" and the regulations concerning the marketing of milk in the area are commonly referred to as "orders". There are currently forty (40) such milk marketing orders being administered by the Secretary throughout the United States.[1] These are described at 7 C.F.R. Parts 1001 through 1139 and these marketing areas encompass virtually all major metropolitan areas in the continental United States—the notable exceptions being those in California.

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[1]The Secretary recently recommended the merger of five markets covering most of the six-state southeast region. 60 Fed. Reg. 25014 (May 10, 1995).

These marketing areas are regions defined by regulation (*eg.*, 7 C.F.R. §1040.2) in which milk is distributed for sale to the consumer. Since the marketing area deals with sales of bottled milk, location of the dairy farm is not relevant. For example, there are now no dairy farmers located in Wayne County, Michigan, but it constitutes the largest market for milk in the Southern Michigan marketing area. Similarly, that milk is produced in one state for marketing in, and regulation under an order in, another state is totally irrelevant. A producer comes under the benefits of an order when that producer chooses to market milk to a regulated plant.

The corner stone of this legislation is a two tier pricing system—handlers pay for the use of the milk and producers receive a uniform price regardless of use. Handlers pay minimum prices per hundred weight which are based upon the use for which the milk is being made. Fluid milk use is called Class I, and handlers pay the highest price for that milk. Soft milk products, such as yogurt, creams and the like are priced at a lower Class II price. Other products with a longer shelf life, such as butter, cheese and powder, are treated as Class III or the lowest value. The Class I price paid by handlers (not Class II and Class III) is also based, in part, on the location of the plant.

All of the money received is then "pooled", deductions for reserves and expenses of administration are made and the balance is "blended" so that the minimum prices that producers receive are uniform in that any differences do not result from differences in the actual use to which the milk of a producer is placed.

The minimum price paid to producers is also based, in part, on the location of the plant which receives the producers' milk. These are called "location adjustments". Although handlers pay adjustments only on Class I milk, the producers' minimum price on all of their milk, regardless of use, reflects the location to which it was delivered. The "uniform price" is not

known until the effect of location adjustments charged or credited to handlers and producers is calculated. 7 C.F.R. §1040.61.

Simply stated, this is the formula for computing the minimum price that a producer receives: Plants make payments to the producer settlement fund for milk based on the use to which the plant put the milk. Payments for Class I usage are also adjusted based upon the plant's location. Plants with a positive location or zone pay additional money, those with a lower zone pay less. The total receipts from the plants are then reduced by the total value of positive location adjustments due to producers and increased by the total value of negative location adjustments on producer deliveries. This net amount is divided by the total pounds for an "uniform price". Before payment to a producer, that producer's price is determined by adjusting the uniform price location based upon the location to which he delivered the milk. 7 C.F.R. §§1040.60-62.

Not only does the amount of the location adjustment directly impact the minimum price paid producers by location of his deliveries, but, as noted above, the "uniform price" before individual producer prices are set includes and reflects locations of the plants who pay and the locations to which producers have delivered. Because handlers pay location adjustments only on Class I milk while producers receive the adjustments on all of their milk, a minus location adjustment (lower price) will contribute to a higher over all blend price though the adjustment to the blend will be at a lower rate than the rate of the location adjustment. Conversely, a positive location adjustment (higher price) will lower the overall blend, again at a lower rate than the rate of adjustment.

The Secretary has defined location adjustments as geographic zones, or in terms of distance from fixed points. Within defined zones, all plants have the same price. Zones do not have to be in the marketing area.

Location adjustments, though based on the distance that the plant is from the primary market, reflect the transportation costs only in part. The Secretary has historically set rates of adjustment conversely to the supply and demand in the market, with use of higher rates of adjustment in areas where the supply-demand is tighter and the use of lower rates in areas where the supply-demand is lower. For example, the rate of 2.5 cents per hundred weight per ten miles in milk-deficit Georgia is about twice the rate used in Wisconsin. *Cf.* 7 C.F.R. §1007.52 with 7 C.F.R. §1030.52.

The Secretary has the authority to amend or modify those orders. 7 U.S.C. §608c(17). These orders are only modified after notice *and hearing* rule making unlike the more common method of notice and comment. The Secretary has promulgated rules of practice describing the process. 7 C.F.R. §§900.1 *et seq.*

At rule-making hearings, testimony is taken under oath and exhibits are presented in support of, or in opposition to, proposals that the Secretary has noticed. An agent of the Secretary participates in the hearing to the extent of cross examination of witnesses. After the hearing, parties are permitted to file briefs and the Secretary then issues a written recommended decision based upon the record created at the hearing. 7 U.S.C. §608c(4), 7 C.F.R. §900.12. A comment period follows, and the Secretary either accepts, rejects, or modifies the recommended decision. After the Secretary makes a final decision, the proposed amended order is placed before producers or cooperative associations in a referendum for their approval. 7 C.F.R. §§900.300 *et seq.*; 7 U.S.C. §§608c(8)-(9), (12), and (19).

The Act specifies *when* the Secretary can make amendments, 7 U.S.C. §608c(18), and *what* kind of regulations he can promulgate. 7 U.S.C. §608c(5). The Secretary does not have the authority to make amendments based solely on agency policy, current national or industry politics, or economic theory. Any change by the Secretary must be based on the record, he cannot

fix minimum payments to producers based on use, and, in any event, he can only modify the order after he has first determined that sufficient marketing changes have occurred justifying such changes. 7 U.S.C. §608c(4).

2. On May 24, 1988, the Secretary held a formal rule-making hearing to consider, among others, an amendment to the Southern Michigan Order proposed by P.E.C. to modify location adjustment mileage rates so as to reduce the prices paid to Producers[2] and enhanced the minimum prices paid to P.E.C.

On February 21, 1989, the Secretary issued a Recommended Decision, published at 54 Fed. Reg. 7,938 (February 24, 1989), which recommended adoption of the P.E.C. location adjustment proposals.

On June 20, 1989, the Secretary issued a Final Decision, published at 54 Fed. Reg. 26,768-26,780 (June 26, 1989), Pet. App. 71a - 126a, adopting the P.E.C. location adjustment proposals and rejecting the exceptions submitted by the Producers. On July 6, 1989, the Secretary issued a Final Rule amending the pricing regulations of Order 40, as requested by P.E.C., effective for milk marketed on and after September 1, 1989.

3. The Producers were particularly damaged by the proposal because the challenged amendments[3] to the Order amended 7 C.F.R. §1040.52(a) by changing "1 cent" to "2.25 cents". This new rate is greater than any other rate in surplus production

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[2]"Producers" refers to Farmers Union Milk Marketing Cooperative, Manitowoc Milk Producers Association and the individual dairy farmer members of Farmers Union named as plaintiffs below.

[3]Final Rule, 54 Fed. Reg. 29,327, 29,328 (July 12, 1989). Amended Order. Pet. App. 71a - 126a.

markets of the north central states. The amended rate reduced the minimum prices to Producers by almost thirteen cents per hundredweight at Frigo's Carney, Menominee County, Michigan plant, to twenty cents per hundredweight at Frigo's Lena, Oconto County, Wisconsin plant to twenty-three cents per hundredweight at Frigo's Wyocena, Columbia County, Wisconsin plant.

The adverse impact of these changes has been significant on the Producers.[4] This should surprise no one. The P.E.C. stated at the rule-making hearing that its primary intent by these proposals was to "redistribute" the money to producers by increasing the revenue of its members in the Southern Peninsula and reduce the revenue to the non P.E.C. members—*i.e.*, Producers.

Because this was a resulted-oriented decision, the Secretary had to abandon his traditional reliance upon 7 U.S.C. §608c(18) in setting location adjustments. Contrary to prior (and subsequent) decisions applying 7 U.S.C. §608c(18) standards, the Secretary (1) increased Southern Peninsula milk prices notwithstanding a finding of plentiful milk supplies, and (2) increased the Upper Peninsula/Wisconsin mileage rate to one characteristic of deficit markets.

The Secretary expressly relied upon the U.S.C. §608c(5)(A) as the only authority and standard to support the amended location adjustments.

The Secretary wrote:

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[4]Producers estimate that the amendments in the aggregate shifted about one million dollars per year from Producers and other dairy farmers in Wisconsin and the Upper Peninsula of Michigan to Southern Peninsula farmers--predominantly P.E.C. members.

> Section 8c(18) is the authority for the Secretary to change the Class I differential if supply and demand warrants a change in order to increase or decrease milk production. The ***authority for the Secretary to provide for pricing zones (location adjustments) in an order is found in section 8c(5)(A) of the Act.***

54 Fed. Reg. 26,774-26,775 (June 26, 1989) Pet. App. 99a-100a. [Emphasis added, parenthetical material in original].

The Secretary relied on but one factor to justify the mileage rate amendment to 7 C.F.R. §1040.52(a)(2). This was the increased costs of hauling milk. 54 Fed. Reg. 26,777 (June 26, 1989). Pet. App. 112a. However, in promulgating the amendments to the zone rate adjustments, the Secretary acknowledged that:

> These changes will produce a flatter[5] Class I and uniform price structure within the marketing area. . . * * *
>
> [T]he change from seven pricing zones to three pricing zones ***is not tied to the cost of moving milk***. . . .

54 Fed. Reg. 26,772 and 26,774 (June 26, 1989) Pet. App. 88a and 98a. [emphasis added and footnote added]

4. In September 1989, Farmers Union Milk Marketing Cooperative and individual members, filed suit in the Northern Division of the Western District of Michigan complaining, *inter alia*, that the price amendments exceeded the Secretary's statutory authority, and were made without supporting evidence and in

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[5] "Flatter" price means that the range from highest to lowest prices in the marketing area is very narrow. This contradicts the "sharp", not "flat" pricing, the Secretary adopted for milk not supplied by members of the P.E.C.

violation of minimum requirements of reasoned agency decision making. Plaintiff Producers first had to overcome agency arguments that they did not have standing to complain of lost income. *Farmers Union Milk Marketing Coop. v. Yuetter,* 930 F.2d 466 (6th Cir. 1991). By early 1992, the issue of standing was resolved in the Producers' favor, the Handlers' action was consolidated with that of Producers,[6] and the district court received cross-motions for summary judgment on the administrative record.

The district court, per Judge Benjamin F. Gibson, using common rules of statutory construction, and in accordance with *Chevron,* found that the Act clearly required a §608c(18) economic impact analysis before making any modifications to the pricing as the agency had maintained in the past. It held that to do otherwise would "theoretically allow the Secretary to circumvent the specific Congressional delegation by conducting all market regulation through price adjustments." Pet. App. 58a. Because the Secretary admitted that he did not use the analysis required under 7 U.S.C. §608c(18), that court held that the Secretary improperly promulgated the regulation.

5. On appeal, the court of appeals recognized that there was a change in agency statutory construction, and that the agency incredibly disavowed such change. Nonetheless, that court found that the agency's new-found construction was permissible under the Act and reversed the district court.

After the court of appeals issued its decision, the Secretary issued a recommended and final decision in the proposed merger of several Southern milk orders where he reverted to the decades-old analysis as required by 7 U.S.C. §608c(18), in making location adjustments. 60 Fed. Reg. 25014, 25037-25046 (May 10, 1995) (Reasoning, for example: "There is no reason to expect handlers

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[6]The Petitioners are sometimes referred to as "Handlers".

to pay any more than necessary to obtain an adequate supply of milk for fluid use. The prices at [Zone 10] are appropriate ***using this standard.***" and "The available supplies of milk in [Zone 12] do not justify continuation of the present price structure." [emphasis added])

6. On January 23, 1995, the court of appeals denied the Producers and Handlers' requests for rehearing. The Handlers petitioned this Court for a writ of certiorari on April 21, 1995. Producers received their copy of the Petition on April 24, 1995. Pursuant to Rule 12.4 of this Court, the Producers are submitting this Brief in Support of the Petition.

REASONS CERTIORARI SHOULD BE GRANTED

The court of appeals decision in the instant case represents a conflict within the circuits in administrative law in the wake of this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984) and this Court's recent decision in *Brown v. Gardner,* ___ U.S. ___, 115 S. Ct. 553 (1994). The court of appeals has, in its interpretation of the *Chevron* analysis, found ambiguities without resort to standard rules of statutory construction. As a result the Sixth Circuit has set precedent for the proposition of near judicial abdication in review of agency actions.

I

If anything, Petitioners' first question phrases the issue in terms too kind to the agency. In the instant case, the agency not merely changed its policy after the rule making hearing, but did so only momentarily for the purposes of obtaining a result that it could not have obtained under prior policies, and, once that objective was realized, the agency returned to a decades-old policy of requiring 7 U.S.C. §608c(18) economic impact analysis when adjusting minimum prices paid to producers, regardless of how

the adjustment was characterized. Not only did it make this quick change about, but both before the district court and the court of appeals it argued that it had never changed its position in the first place. *In re Lansing,* 50 Agric. Dec. 1453 (1991) Pet. App. 185a. The court of appeals found such disavowal "not credible". Pet. App. 30a. The district court rejected this claim as well.

The facts in this case thus frame the issue as to how much, if any, deference courts should give to such an agency double flip-flop without any explanation of why such change is necessary in light of this Court's holdings in *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 41-42 (1983) and *Chevron.*

The court of appeals has ignored the requirement of agency explanation, and has, instead, chosen to defer to the agency's view so long as it is permitted under any malleable stretch of interpretation of the Act. The court of appeals decision goes so far as to indicate that the agency's view need not be spelled out, only potentially understood. As a result, the decision of the court of appeals conflicts with the other circuits and this Court.

Justice Scalia, has argued that reasonable agency determinations, even if deviant from "longstanding and consistent" agency interpretations, should receive deference. *Chevron* has come to allow agencies to change their minds so long as the new rationale is consistent with one of the possible interpretations of the statute and one "it thinks most conducive to accomplish most of the statutory purpose." This flexibility permits the agency to change direction without Congressional

action. Antonia Scalia, Judicial Deference to Administration Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).[7]

Arguing that the court of appeals is wrong in the instant case is not arguing against this postulate. The court of appeals departs from the Scalia standard of deference by excluding "statutory purpose" from the interpretive equation employed by the agency. The court of appeals decision cheapens the force of Justice Scalia's logic by making any ***result*** of agency action deferrable even if the rationale is unstated, unclear, or first developed in the course of post-rulemaking litigation.

The court of appeals decision provides more than that flexibility that is necessary to adapt to changing circumstances, policies and concepts for the public good, but, beyond the necessary, permits, even licenses, the facility to fashion any result the agency desires or feels politically expedient at the time so long as the courts can discern some statutory rationale absent the agency's own expression of one. Such alleviates the necessity of any agency explanation of the change as required by *Motor Vehicle Mfrs. Assn.*

The regulations in the instant case establish the economic relations between plants and dairy farmers. Relying on this regulatory basis, Producers and Handlers have contracted with each other and others in the buying and selling of milk. Their economic interrelationship draws its strength from these pricing regulations. For the Secretary momentarily to ignore his own long standing policy that undergirds these pricing regulations, and, thus, rearrange the economic landscape without any reasoned explanation of the rationale for such a departure is nothing less than giving the Secretary the kind of unfettered ability to regulate the dairy economy that the Congress

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[7]The court of appeals relied upon this argument in its decision in this case. See Pet. App. 31a, n.3.

specifically sought to avoid when it repealed the handler licensing provisions and adopted the present statutory scheme. *Zuber v. Allen,* 396 U.S. 168, 174, (1969). There is a misapprehension of *Chevron* when the Secretary can, under the guise of a *Chevron* analysis, read a statute so differently so as to enlarge the statute's reach beyond that intended by Congress in the first place. This is nothing less than granting an agency the license to legislate liberally its own limitations.[8]

In order for the Secretary to do what he did in the Southern Michigan area he had to ignore the supply-demand limitations of 7 U.S.C. §608c(18), because he raised Southern Peninsula prices even though the market had an adequate supply of milk there was no need to change the pricing structure. (Compare earlier Southern Michigan decisions, 42 Fed. Reg. 37562, 37565 (1977), 33 Fed. Reg. 6027, 6030-31 (1968), and 30 Fed. Reg. 7703 (1965), in which adequate milk supplies restrained requests for price increases). In large part because of that and a separate finding that there was no need to make changes to maintain a supply of milk, there was no policy basis supporting his decision. By ignoring 7 U.S.C. §608c(18) and the lessons of

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[8] Such authority also gives the agency the right to overrule the Court by the creation of nearby differentials. *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314, 24 L.Ed. 2d 345 (1969). The Secretary virtually found the nearby milk of P.E.C. more valuable than the more distant milk of the Producers and utilized two distinct schemes to set location prices--one scheme for the P.E.C. group and one for the Producers. Allowing the Secretary to create economic stress on the politically impotent Producers for the benefit of the politically potent cooperatives is to authorize the Secretary to participate in, and create, the very ruinous marketing conditions for which the power was given to the Secretary to eliminate. *Id.*

Adam Smith, the Secretary felt free to raise Southern Michigan prices in the face of a production glut, and to increase mileage rates without regard to need for transportation incentives. In this regard, the court of appeals decision also conflicts with the Third Circuit which has held that the Secretary can only change a marketing order only after he finds that there are disorderly marketing conditions making such a change necessary. *Lehigh Valley Farmers v. Block,* 829 F.2d 409 (3rd Cir. 1987) below 640 F. Supp. 1497 (E.D. Pa. 1986).

Chevron must be analyzed in terms of the nature of the agency action involved. To announce changes in policies or interpretations of the underlying statutes in a notice and comment rulemaking procedure is one thing. Notice and hearing rulemaking is something altogether different. In the latter fundamental fairness demands that participants are entitled to *prior* notice of any changes in agency interpretations in policies upon which a regulation will issue so that the participants can fully prepare for, and participate in, the evidentiary portion of the rulemaking proceedings.

When an agency, such as the Secretary in this case, abandons a decades-old policy and interpretation momentarily for just one case, and not only does not explain how the change in interpretation is necessary to further the purposes of the Act, but incredibly denies it has made the change at all, that rationale deserves no deference whatsoever.[9] In that regard, this Court in

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[9]The Court has touched on the issue. *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 1561, 164, 89 L.Ed. 124 (1944) (Earlier pronouncements, reasoned and consistent are persuasive if not controlling.) *INS v. Cardoza-Fonseca,* 480 U.S. 421, 426 n. 30, 107 S.Ct. 1207, 1221, n. 30, 94 L.Ed. 2d 434 (1987) (Conflicting interpretations differing from earlier pronouncements get considerably less deference.) *Motor Vehicle*

response to the first question raised by the Petitioner should reestablish standards of judicial deference to agency action.

II

The second question raised by the Petitioner is whether in the first step of *Chevron*, the court is required to use the normal tools of statutory construction or shall the court find ambiguity exists even if such ambiguity only arises if canons of statutory construction, and the inferences that they yield, are ignored.

The nature of statutory interpretation lies at the core of the court of appeal's confusion. In *Chevron* the first order is to see if Congress speaks clearly.[10] The Court has spoken to the issue on several occasions.

Deference to agency rationale ends when clear statutory meaning begins. *Teamsters v. Daniel,* 439 U.S. 551, 566, n. 20

Mfrs. Assn., State Farm Mut. Auto Ins. Co. 463 U.S. 29, 41-42. (A settled interpretation that persists over time is presumptively to be preferred.) *Kungys v. U.S.*, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550, 99 L. Ed. 2d 839 (1988). (Introducing new criteria and standards not provided by statute is impermissible.)

[10] The court of appeals hints that Congress is practically incapable of speaking clearly enough to stop the *Chevron* analysis at the first step when it questions:

> While we will not dwell on whether in recent years "unambiguously expressed intent of Congress" has become an oxymoron. . .

Pet. App. 23a. If this were the case, then the first step in *Chevron* is a meaningless exercise.

(1979) ("This deference is constrained by our obligation to honor the *clear* meaning of a statute as revealed by its language, purpose, and history." [emphasis added])

The question is whether the court must find a clear interpretation in the first step, or start with the agency's view and first find that the agency is clearly wrong. The Court has said both. "In sum, the text and reasonable inferences from it give a *clear* answer against the Government, and that, as we have said, is 'the end of the matter.'" *Brown v. Gardner,* S.Ct. at 556. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781, 81 L.Ed. 2d 694 (1984) [emphasis added]. The middle ground is to use the plain language as a foil by which to observe the agency's rationale. *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 171 (1989) "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."

All of this places the emphasis on whether determination of the existence of ambiguity in the first *Chevron* step, or in an analysis of an agency's own interpretation in the second step, requires a resort to statutory construction. "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 260 (1991) (SCALIA, J., concurring in part and concurring in judgment).

Focused differently, the question is whether the courts must first discern if there is a plain interpretation arrived at by proper statutory interpretation and only then compare that interpretation with the agency's own, as *Chevron* implies, or, alternatively, see if the agency's interpretation is a possible one without resort to such statutory analysis.

A search for clear meaning in the first step requires the Court to examine a statute without reference to the spin of ambiguity created by the agency. The court's duty is to start with

the statute, not agency construction. The applicability of 7 U.S.C. §608c(18) then requires examination of milk order price rules in practical context—a step which the court of appeals overlooked entirely.[11]

The first rule of statutory construction is to use the plain meaning of the words used. *Good Samaritan Hosp. v. Shalala,* 508 U.S. ___, ___, 113 S.Ct. 2151, 2157 (1992) The reading must be of the whole statute, not isolated passages. Utilizing these canons of construction there is no ambiguity in the relevant statutes in this case. Statutory interpretation is a "holistic endeavor". *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371 (1988).

The Congress requires that the Secretary,

> . . . prior to prescribing **any term** in any marketing agreement or order, or amendment thereto, relating to milk or its products, is such term is **to fix minimum prices to be paid to**

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[11] A reasonable interpretation of words alone may overlook an absurd or irrational result in their application, which must be avoided if at all possible. *Chapman v. U.S.,* 500 U.S. 453, 476 (1992) (STEVENS, J., dissenting. "There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result." In practical application, the Secretary's interpretation would irrationally attribute Congressional concern for only part of the formula by which the unadjusted "uniform price" is calculated. 7 C.F.R. §1040.61, Pet. App. 2741; and in a recent decision by the Secretary, it would imply legislative directives for prices and supplies in Birmingham, Alabama (Zone 7, base zone) but not Nashville (Zone 1) or New Orleans (Zone 12). 60 Fed. Reg. 25014, 25037-25046 (May 10, 1995).

> **producers** or associations of producers, or **prior to modifying the price fixed in any such term,** shall ascertain the parity prices of such commodities.

7 U.S.C. §608c(18) [emphasis added]. It then goes on to specify factors to be weighed in changing the prices and farm income, factors the Secretary admittedly did not consider in this case.

The statute is unambiguous in that "any term" that "fix[es] minimum prices ***to be paid to producers***" is subject to 7 U.S.C. §608c(18). An unadjusted price exists only in the abstract. The only price producers receive under any federal milk order is the price on their milk check and that includes the location adjustments. Every location adjustment is a term which fixes or modifies "minimum prices to be paid to producers". Every location adjustment affects "level of farm income" as used in 7 U.S.C. §608c(18). Uniform (blend) prices paid to producers cannot be determined in the aggregate, or to individual producers, without reference to the value of location adjustments. 7 C.F.R. §1040.61, §1040.75.

By regulation, the Secretary, himself, has clearly defined the "minimum prices paid to producers" as a price resulting from the operation of location adjustments on the uniform price.

> (a) Except [when paying the cooperative association] . . . each handler (except a cooperative association) ***shall pay each producer for milk . . . not less than the applicable uniform prices computed pursuant to 1040.61 adjusted by the location and butterfat differentials*** pursuant to 1040.75 and 1040.74, respectively . . . .

7 C.F.R. §1040.73 [emphasis added].[12] The court of appeals finding that "any such term" is ambiguous as to whether it means the uniform price or the uniform price as adjusted assumes that the Secretary will only speak of minimum price as one term. However, the statute contemplates that the minimum price shall be either "fixed" by terms or by operation of a "method for fixing". The Secretary has chosen the latter. Every part of the pricing formula is "any term" contemplated by, and subject to, 7 U.S.C. §608c(18) standards. A change in any part of the formula affects "farm income" to which 7 U.S.C. §608c(18) is directed. An interpretation which avoids application of the standard to any part of the formula would also consequently divorce its application to the bottom line of prices and income to which 7 U.S.C. §608c(18) is directed. This would be absurd result.

This illustrates a second major cannon of statutory construction. A phrase in isolation that is ambiguous is clarified by the statutory context. *United Savings Assoc. of Texas, supra,* U.S. at 371 (1988). One cannot read 7 U.S.C. §608c(5) alone. It must be read in terms of the whole Act. Similarly "any such term" must be read in the context that speaks of effects on minimum prices. 7 U.S.C. §608c(18) All parts of the statute must have meaning. *Jarecki v. G. D. Searle & Co.,* 367 U.S. 303, 307-308 (1961). As such one must reject those interpretations making portions meaningless by ignoring them. *National Labor Relations Board v. Health Care & Retirement Corporation of America,* ___ U.S.___, ___, 114 S.Ct. 1778, 1783 (1994). Courts must give effect to all of the statutory language. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979).

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[12] In modifying the zones, the Secretary never modified this term (*i.e.,* 7 C.F.R. §1040.73) that makes location adjustments and uniform prices two integral and interdependent parts of the same whole--minimum prices paid producers.

Another canon of construction commonly used is to look to the purpose of the Act. If an interpretation yields a result inconsistent with the purpose, it should be rejected. *Gustafson v. Alloyd Company, Incorporated*, ___U.S.___, ___, 115S.Ct. 1061, 1069 (1995). Since the very purpose of the Act is to promote sufficient income to producers, it is unreasonable to find valid an interpretation that, on the one hand, requires the Secretary to formulate a price that will "assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs" (7 U.S.C. §608c(18)) while on the other hand permits the Secretary to "adjust" these very price levels without consideration of such standards, even if such adjustment would emasculate the fundamental price below the desired needs.[13] The district court recognized this when it looked at 7 U.S.C. §602 where the pricing policy of Congress was enunciated. Pet. App. 55a. The court of appeals did not make an analysis of the Secretary's interpretation to determine if the policy of the Act was furthered. This Court should instruct that the undertaking avoided by the court of appeals is essential to judicial compliance with *Chevron*.

In the first step of *Chevron*, the courts should interpret the statute through the use of the normal canons of statutory construction. If the statute is unambiguous at this state, then that is the end of the matter. On the other hand, if such interpretation reaches a conclusion that the statute is ambiguous, only then can the courts consider the agency's view and determine if the

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[13]This Court has held that authority under the Act is to be narrowly construed. *Zuber, supra.* As such, any interpretation of the statute under *Chevron* must determine if ambiguity exists within such a narrow interpretation. *United States v. Centennial Savings Bank FSB*, 499 U.S. ___, ___, 111 S. Ct. 1512, 1519 (1991) (Tax exemptions given narrow interpretations.) This analysis also belongs in the first step of *Chevron*.

agency's interpretation is consistent with one of those statutory constructions already found.

CONCLUSION

The petition for a writ of certiorari should be granted. The confusion among the courts of appeals as to when and how to apply statutory construction requires further explanation of *Chevron.* Alternatively, the Producers suggest that the Court grant the petition, vacate the court of appeals decision, and remand it for consideration of the Court's decision in *Brown v. Gardner, supra*, or the forthcoming decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* No. 94-859 (argued April 17, 1995).

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